Supreme Court, U.S.
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No. 95-1225

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. McGILL,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

NICHOLAS T. SCOTT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer, judicially determined to be mentally incompetent, may invoke the doctrine of equitable tolling to suspend or enlarge the limitation periods contained in 26 U.S.C. 6511(a) and (b) to recover an undisputed overpayment of taxes.

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OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Scott* is unreported but is set out in Pet. App. 31a-34a. The two opinions of the district court (Pet. App. 35a-59a, 60a-76a) are reported at 795 F.Supp. 1028 and 847 F.Supp. 1499)

JURISDICTION

The judgment of the Court of Appeals in *United States v. Scott* (Pet. App. 34a) was entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The government filed its writ as of January 31, 1996.

By letter of February 26, 1996, respondent Scott, waived his right to file a brief in opposition.

By letter of March 22, 1996 the Clerk of the Court indicated that the Court requested a response to the petition, to be filed on or before April 23, 1996.

By letter of April 15, 1996 Chief Deputy Clerk, Francis Lorson, informed the respondent that an extension of time to file the response had been granted to and including May 12, 1996.

The petitioner invoked the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS DISCUSSED

Section 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. 6511, 7422, are set forth at Pet. 2-4.

STATEMENT OF THE CASE

1. Respondent, Nicholas T. Scott, (taxpayer) overpaid his 1984 taxes in the total amount of $30,096. The mentally incompetent taxpayer filed his 1984-1988 tax returns on November 29, 1989. The government (IRS) refused to refund the undisputed overpayment, alleging the limitation periods contained in 26 U.S.C. 6511 precluded return of the overpayment. The overpayment resulted from the payment of four payments of estimated taxes. Three payments were made by taxpayer's father (Gene Scott) acting under a general power of attorney. The fourth and final payment was made by the taxpayer under the direct physical supervision of taxpayer's father.

2. Taxpayer Scott filed a complaint in the U.S. District Court for Hawaii against the United States and the IRS on January 8, 1992. Scott alleged that his mental incompetency during the relevant tax periods (April 1985 through November 1989) supported the application of the doctrine of equitable tolling to the limitation periods contained in the tax refunds statutes, especially 26 U.S.C. Sec. 6511(a) and (b).

In a published opinion dated June 4, 1992, Chief Judge Alan Kay issued an opinion (795 F.Supp. 1028 D. Hawaii 1992 (Scott I)) denying the Government's motion to dismiss for lack of jurisdiction and holding that tax refund claims are subject to equitable tolling.

The district court based its decision on an analysis of the recently decided *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) case. *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants is applicable to suits against the United States." 498 U.S. at 95-96 (Pet. App. 74).

Judge Kay declined to follow *U.S. v. Dalm*, 494 U.S. 596 (1990), a case which the Government relied on heavily in both lower courts. The Government asserted that *Dalm* stands for the proposition that equitable tolling does not apply to tax refund cases. The court held that *Dalm* dealt with the narrow issue of equitable recoupment and not the broad issue of equitable tolling. The *Dalm* case, dealt with an entirely different equitable principle and thus *Irwin*, and *Dalm* were distinguishable. (Pet. App. 68a-71a).

Additionally, Judge Kay held that mental incompetence can in the proper circumstances, toll the statute of limitations in a tax refund case. His decision was based on fundamental principles of equity and fairness. (Pet. App. 76a).

A bench trial regarding the taxpayers competence was held from October 5, 1993 through October 7, 1993.

After reviewing extensive trial evidence, including the reports and testimony of two highly qualified government and taxpayer medical experts, and extensive deposition testimony of numerous lay witnesses, the trial judge concluded that the taxpayer was mentally incompetent during the relevant time period from January 1985 through November 1989.

Judge Kay again held that Sec. 6511(a) and (b) were subject to the doctrine of equitable tolling. The court declined to apply the recently decided First Circuit Court of Appeals decision of *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) finding the analysis imperfect. (Pet. App. 47a-51a).

3. On appeal, the court of appeals in a split decision concluded that Sec. 6511 was subject to equitable tolling and therefore affirmed the district courts opinion.[1]

Judge Wiggins, writing for the majority applied the general rule as announced in *Irwin* that " . . . the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress of course, may provide otherwise if it wishes to do so." *Irwin*, 95-96, (Pet. App. 4a). In essence, the majority held *Irwin* controlling in the absence of contrary congressional intent.

The majority also refused to follow the First Circuits opinion in the *Oropallo* case, noting that since the Ninth Circuit reads Sec. 6511(a) as an effective statute of limitations and not "illusory," the court was not bound to

[1] *Scott v. United States* (Nos. 94-5321, 15323 9th Cir. October 5, 1995) and *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995) were argued the same day and the opinions were issued the same day. The rationale for the published *Brockamp* decision is equally applicable to the *Scott* decision. (See Pet. App. 33a-34a) The *Brockamp* decision reversed a district court holding not allowing equitable tolling in tax refund actions and remanded the case to the district court for a determination of the taxpayers mental competency.

follow the *Oropallo* analysis. (See Pet. App. footnote 1, pages 5a-7a).

Finally, relying on several post *Irwin* decisions the court held that mental incompetence can toll a statute of limitations (Pet. App. 7a-8a).

In his dissent Judge Fernandez outlined and synthesized all of the arguments opposing equitable tolling in tax refund cases and seemingly adopted all of them. In essence he argued that *Dalm* controls and not *Irwin*. Additionally he opined that Sec. 6511(b) acts like a statute of repose rather than as a statute of limitations.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Affect a Great Many Persons

Three circuit courts have directly passed on the issue of the applicability of equitable tolling to Sec. 6511. (*Oropallo v. U.S.*, 1st Cir. 1993; *Webb v. U.S.*, 4th Cir. 1995; and *Brockamp and Scott*, 9th Cir. 1995) Additionally, the 11th Circuit in an indecisive trio of cases has yielded a mixed set of opinions on the applicability of the doctrine. (See *Vintilla v. U.S.*, 531 F.2d 1444 (11th Cir. 1991) and compare with *First Alabama Bank N.A. v. U.S.*, 981 F.2d 1226 (11th Cir. 1993) and *Rosser v. U.S.*, 9 F.3d 1519 (11th Cir. 1993).

Each court that has considered the issue has issued an opinion based on a different analysis of Sec. 6511 and *Irwin*.

Respondent submits that this Court should allow additional lower courts to consider this matter, in order

that this Court have the benefit of additional judicial and scholarly consideration before taking this matter up.

The existence of a present conflict is not of overwhelming weight when balanced with the relatively few individuals who are currently effected by the rulings.

In the 5-1/2 years since *Irwin* was decided there have been a mere handful of cases in the lower courts interpreting *Irwin*, either applying or not applying equitable tolling to tax refund actions.

The government, in its petition and in briefs submitted in lower court actions has raised the spectre of a flood of incompetent taxpayers requesting refunds of moneys which they overpaid the IRS. The floodgates have *not* opened, there are less than a dozen reported cases in the 5-1/2 years since *Irwin*. There is no widespread litigation on the issue. The Court has more pressing issues to consider than one which, given the hindsight of many years, actually affects few individuals.

II. It is Likely That Corrective Legislation Will Be Passed by Congress That will Moot the Issue.

On January 31, 1996, President Clinton requested the Treasury Department develop a proposal to submit to Congress to assure that taxpayers who are mentally incapacitated are not harshly treated by the time limitation rules for seeking a refund.

Treasury has developed and announced such a proposal (Resp. App. 1) This proposal was submitted on or about March 21, 1996 to the House Ways and Means and Senate Finance Committees.

Given that this proposed legislation strikes an effective balance between the Government's need for revenue and the unfairness and inequity of allowing the Government to retain the moneys of incapacitated taxpayers, to which it is not entitled, there is a substantial likelihood that this proposal will pass in its present form.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

If this court does grant the petition for certiorari, Respondent, Nicholas Scott, requests the opportunity to fully brief the issues involved, including but not limited to; and analysis of the impact of the *Irwin* decision and a complete statutory analysis of the language of 26 U.S.C. 6511(a) and (b).

Respectfully submitted,

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DEPARTMENT OF THE TREASURY

TREASURY [SEAL] NEWS

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TREASURY ANNOUNCES PROPOSAL TO EXTEND THE TIME LIMIT FOR CLAIMING TAX REFUNDS WHERE TAXPAYERS ARE INCAPACITATED

On January 31, 1996, the President directed Treasury to develop a proposal to assure that taxpayers who are unable to handle their affairs for compelling reasons are not harshly treated by the time limit rules that apply for seeking a tax refund.

In response to this request Treasury announced today that it will recommend to Congress a proposal to amend the time limit within which claims for tax refunds must be made, extending the time in situations involving incapacitated taxpayers.

Under the proposal, the limitations period in the case of individual taxpayers would be extended for the period of time a taxpayer was subject to disability, in effect extending the statutory time by the period of the disability. "Disability" would be defined to include judicial determinations of incompetency, commitment to mental institutions or hospitals, or other debilitating physical,

mental or psychological conditions that prevent the taxpayer from managing his or her financial affairs.

Secretary Rubin stated, "The President and I believe that we should have a tax system that is responsive to the personal hardships faced by incapacitated taxpayers. This proposal meets these goals."